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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-849

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION and MOTOR CAR DEALERS ASSOCIATION OF SOUTHERN CALIFORNIA, *Appellants,*

v.

ORRIN W. FOX CO., a corporation, MULLER CHEVROLET, a corporation, and GENERAL MOTORS CORPORATION, *Appellees.*

No. 77-837

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, and the DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, and DORIS V. ALEXIS, as Director of the Department of Motor Vehicles of the State of California, *Appellants,*

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On Appeal from the United States District Court for the Central District of California

MOTION OF THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION FOR LEAVE TO FILE OUT OF TIME A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

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MOTION OF THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION FOR LEAVE TO FILE OUT OF TIME A BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

The National Automobile Dealers Association ("NADA") hereby moves, pursuant to Supreme Court Rule 42, for leave to file out of time a Brief Amicus Curiae in support of Appellants. This Motion is necessitated by the refusal of certain of the Appellees to consent to the filing of the appended Brief.[1]

The interests of amicus NADA are set forth in detail in its Brief. To summarize, NADA represents the vast majority of automobile dealers of domestic automotive manufacturers throughout the United States, including numerous dealers in the State of California. One of the purposes of NADA, as set forth in its Certificate of Incorporation, is to represent and act on behalf of these dealers "in promoting model laws and the enactment of such legislation as will benefit the trade and the public, recognizing the principle of self-determination in each state."

The determination of the United States District Court for the Northern District of California that Sections 3062 and 3063 of the California Automobile Franchise Act (California Vehicle Code §§ 3060-3069) ("Act")—which sections regulate the establishment of automobile dealer-franchises in the State of California —violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution (Amendment XIV, Section 1), is of obvious significance to all NADA member dealers.

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[1] Amicus NADA respectfully requests that this Court grant it leave to file, out of time, its Brief Amicus Curiae in support of Appellants. Acceptance of the Brief out of time will not harm, injure or prejudice the interests of any of the parties to this litigation. The Amicus Brief focuses on issues not previously briefed by Appellants. The discussion of these issues will, we respectfully submit, be useful to the Court as it determines this matter.

In recent years, thirty-seven other states have enacted legislation regulating the relationship between motor vehicle manufacturers and their dealer-franchisees. Seventeen of these laws contain provisions similar to Sections 3062 and 3063.

With two exceptions, all of these laws have survived Constitutional challenge.

The decision in this case will, therefore, have a direct and substantial bearing on the relationship of dealer-franchisees with their franchisor-manufacturers in numerous states across the country.

NADA has developed a practical expertise and overall familiarity with the dealer-franchisee relationship with manufacturer-franchisors. It has in the past, for example, participated extensively in legislative hearings at the Federal level which considered the interaction of this relationship and the problems inherent in this area. NADA respectfully submits that this expertise will materially assist the Court in arriving at a decision in this matter.

JERRY S. COHEN

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On Appeal from the United States District Court for the Central District of California

BRIEF OF THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

STATEMENT OF INTEREST

The National Automobile Dealers Association ("NADA") is a nonprofit corporation organized and existing under the laws of the State of Delaware with its principal office at 8400 Westpark Drive, McLean, Virginia 22101. NADA represents in excess of 21,000 independent automobile dealer-franchisees of domestic automotive manufacturers throughout the United States, including numerous dealers in the State of California. NADA members represent all four domestic automotive manufacturer-franchisors, General Motors, American Motors, Ford and Chrysler.

One of the purposes of NADA, as set forth in its Certificate of Incorporation, is to represent and act on behalf of its dealer membership "in promoting model laws and the enactment of such legislation as will benefit the trade and the public, recognizing the principle of self-determination in each state."

The determination of the United States District Court for the Northern District of California that §§ 3062 and 3063 of the California Automobile Franchise Act (California Vehicle Code §§ 3063-3069) ("Act")—which sections regulate the establishment of automobile dealer-franchises in the State of California—violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution, is of obvious significance and importance to all NADA members.

In recent years, thirty-seven other states have enacted legislation regulating the relationship between motor vehicle manufacturers and their dealer-franchisees. Seventeen of these laws contain provisions similar to §§ 3062 and 3063.

With two exceptions all of these laws have survived constitutional challenge.

The decision in this case will, therefore, have a direct and substantial bearing on the relationship of dealer-franchisees with their franchisor-manufacturers in numerous states across the country.

NADA has developed a practical expertise and overall familiarity with the dealer-franchisee relationship with manufacturer-franchisors. In the past, it has participated extensively in legislative hearings at the Federal level which considered the interaction between automotive manufacturer-dealers and the problems inherent therein.

The impact of the decision of this Court in this matter will affect not only automotive dealers in the State of California, but dealers in other states as well. NADA respectfully submits that its expertise will allow it to materially assist the Court in arriving at a decision in this matter.

ARGUMENT

A. Introduction

As the means of implementing and enforcing the California Automobile Franchise Act (California Vehicle Code §§ 3060-3069) ("Act"), that state legislature chose to subsequently broaden the duties and responsibilities of the New Motor Vehicle Board ("Board") for California. The Board has since functioned as the legislature's *alter ego,* effectuating compliance with the Act's numerous explicit commands. In this case, Appellees' challenge to the Act and to the Board's responsibilities and duties reaches only those

legislative directives which govern the establishment of a franchisor-dealer within a given California market area.[1]

The District Court's decision was based exclusively on an alleged due process violation. That issue is fully covered in Appellants' briefs. Appellees in their Jurisdictional Statement and Motion to Dismiss, however, additionally assert alternatively that the Act conflicts with the Federal antitrust laws and therefore is invalid under the Supremacy Clause and also constitutes an undue burden on interstate commerce.

Amicus fully supports and adopts herein the arguments set forth in Appellants' Briefs. Amicus also asserts that Appellees' alternative arguments regarding the purported conflict of these states' statutes with the Federal anitrust laws and the alleged undue burden on interstate commerce were not considered by the District Court and therefore are not properly before this Court.

However, should this Court reverse and remand the case for further consideration, Amicus submits it would be in the interests of justice and judicial economy to provide the District Court and other courts considering these issues with some guidance as to its determination of the applicability of the Federal antitrust laws and interstate commerce questions.

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[1] Although the District Court declared the entire Act unconstitutional, only § 3062, § 3063 and § 3066 as it incorporated § 3063 were actually before that Court. The factual background of this case, along with its procedural history, are set forth in detailed fashion in Appellants' Briefs. The Briefs also discuss the Act and the stated purposes of the California Legislature in enacting it. To avoid repetition, Amicus adopts Appellants' well stated discussion.

In summary, Appellees' argument concerning the supremacy of the Federal antitrust laws is misplaced. Regardless of whether the California State Statutes conflict or do not conflict with the Federal antitrust laws, those laws do not apply to valid acts of government officials pursuant to state command. The basic question is not that of supremacy, but rather of federalism. Where a state commands its officers or public officials or agents to act in a certain manner, that action does not and cannot fall within the proscriptions of the Federal antitrust laws.

Moreover, absent antitrust questions, it has been a longstanding principle of law that state economic regulation will not be set aside by the Federal judiciary except in limited instances where it has been positively established that the regulation places a clear burden on interstate commerce and that burden outweighs the value of the state's purposes for regulation[2] or where the state regulation discriminates against non-state residents in favor of state residents.[3]

B. The Federal Antitrust Laws Do Not Apply to State Action

The specifically challenged sections of the Act are but a part of the overall legislative scheme representing the considered judgment of the California Legislature.

Section 3062 requires that a manufacturer-franchisor notify the Board and each existing franchise within a

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[2] See *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945); *Bibb* v. *Navajo Freightlines, Inc.*, 359 U.S. 520 (1959); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 443 (1960).

[3] *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951).

particular market area if the franchisor intends to establish a new franchise or relocate a franchise within the area. If any of the existing franchisees file with the Board a protest to the establishment or relocation of the dealership within fifteen days after receipt of notice, the Board is directed by the statute to issue an order temporarily prohibiting the franchisor from establishing or relocating the proposed dealership until the Board has held a hearing to determine if there is good cause for refusing to permit the intended action.

Section 3063 sets forth the considerations which the Board *must* consider in determining whether good cause exists. These considerations are as follows:

1. Permanency of the investment.
2. Effect on the retail motor vehicle business and the consuming public in the relevant market area.
3. Whether it is injurious to the public welfare for an additional franchise to be established.
4. Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.
5. Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.

If the Board determines, based upon its consideration of the legislative factors and other relevant information, that there is "good cause" for refusing to

permit the proposed dealership to be established, the *statute* prohibits the franchisor from establishing the proposed franchise.

The legislature placed the burden of proving this "good cause" at the hearing on the protesting franchisee. The Board is required to render its decision within thirty days after the hearing or else the establishment of the proposed franchise is deemed approved. Finally, § 3068 provides that either party may seek judicial review of a final Board decision.

These provisions are that legislature's explicit command. The Board, in implementing these provisions as dictated by the legislature, is but an extension of the legislature.

Sections 3062 and 3063, and the implementing actions of the Board, represent the purest form of state action. The acts of the Board are clearly encompassed within the doctrine of state action immunity of *Parker* v. *Brown,* 317 U.S. 341 (1943).[4]

Appellees charge, however, that the California Act establishes horizontal trade restrictions among competing dealers and thus stands in conflict to the policies of the Federal antitrust laws. Appellees argument misconstrues the principle of *Parker* that state action, regardless of whether it conflicts with policies of the Federal antitrust laws, is *not* subject to the proscriptions of those laws.

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[4] This doctrine was actually first enunciated not in *Parker* but in *Olsen* v. *Smith,* 194 U.S. 322 (1904). Its constitutional base lies in the concept of federalism. [See, *National League of Cities* v. *Usery,* 426 U.S. 833, 852 (1976); *Hughes* v. *Alexandria Scrap Corp.,* 426 U.S. 794, 810 (1976)].

The challenged state action in *Parker* was an agricultural program under the California Agricultural Prorate Act. According to the Court

> "The California Agricultural Prorate Act authorizes the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers. The declared purpose of the Act is to 'conserve the agricultural wealth of the State' and to 'prevent economic waste in the marketing of agricultural products of the state.' " 317 U.S. at 346.

In *Parker,* plaintiff sought to enjoin enforcement of this program. Plaintiff asserted, in addition to the antitrust claim, that the state legislation imposed an unconstitutional burden on interstate commerce and was preempted by Federal agricultural legislation. The Court rejected all three contentions.

With respect to the alleged antitrust conflict, the Court stated that there was "nothing in the language of the Sherman Act or in its history which suggest that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350-351.[5]

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[5] The Court drew a distinction between these types of regulatory measures, and legislation directly authorizing a violation of the antitrust laws,

> "True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. Here . . . it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy." 317 U.S. at 351-52. *See, Northern Sec. Co.* v. *United States,* 193 U.S. 197 (1904).

Parker also emphasized that California "created the machinery for establishing the prorate program"; and that California "acts through the Commission which adopts the program and which enforces it with penal sanctions." *Id.,* at 352. The Court found

> "The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. *Olsen* v. *Smith,* 195 U.S. 332, 344-45; cf. *Lowenstein* v. *Evans,* 69 F. 908, 910." *Id.*

The basic principles of *Parker* have been recently reaffirmed.

In *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), plaintiff challenged, as a violation of the Sherman Act, a minimum fee schedule for lawyers published by a private county bar association but recognized and supported by the State bar, which "was an administrative agency of the Virginia Supreme Court authorized by statute to administer ethical codes adopted" by that Court.

The Virginia statutes made no mention of minimum fee schedules. Nor did the Virginia Supreme Court's ethical codes. Moreover, there was no evidence that the Virginia Supreme Court ever specifically approved of the State Bar's "suggestions" of adherence to the minimum fees.

On the basis of these facts, this Court rejected the Virginia State Bar's reliance on the state action im-

munity argument. Citing *Parker,* Chief Justice Burger wrote:

> "The threshold inquiry in determining if an anti-competitive activity is state action of the type the Sherman Act was not meant to proscribe is *whether the activity is required by the State acting as sovereign. . . .*" *Id.,* at 790 (emphasis added)

This Court found that although the use of minimum fee schedules was supported by the Bar Associations, these Associations were merely self-regulatory bodies, with no authority to impose minimum fees upon the legal profession. That the State of Virginia "acting as sovereign" had neither set nor required minimum fees was dispositive of the state action issue:

> "Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anti-competitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees. . . ." 421 U.S. at 790.

The plurality opinion in *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1977) also analyzed a *"Parker"* state action claim in terms of whether the challenged anticompetitive action was taken pursuant to state command.

Detroit Edison had for many years provided light bulbs to certain of its customers without additional charge in order "to increase the consumption of electricity." 428 U.S. at 582-84.

Cantor alleged that Detroit Edison was using its monopoly power in the distribution of electricity to restrain competition in the separate market for light bulbs. The utility asserted that its marketing practice was included in a rate tariff approved by the Michigan Public Service Commission, and that as such, the practice was exempt from the antitrust laws under the "*Parker*" state action doctrine.

The Supreme Court disagreed with Detroit Edison. According to the Court, the Michigan statutes did not regulate the distribution of light bulbs, neither the Michigan legislature nor the Public Service Commission had mandated or even studied Detroit Edison's program and the utility's marketing practice did not implement any statewide policy relating to light bulbs. 428 U.S. at 584. Justice Stevens, writing for the majority, distinguished *Parker* as follows:

> "In this case, unlike *Parker,* the only defendant is a private utility. No public officials or agencies are named as parties and there is no claim that any state action violated the antitrust laws." 428 U.S. at 591.

The applicability of *Parker* was therefore limited to suits against the sovereign itself.

In *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), a disciplinary regulation promulgated by the Supreme Court of Arizona restricting attorney advertising was found to be state action. This Court found that this "regulation, though violative of the attorneys' First Amendment rights, was shielded from the Sherman Act by the *Parker* state action doctrine."

The Court held:

> "[The Arizona Supreme] Court is the legitimate body wielding the state's power over the practice

> of law. See, Ariz. Const. Art. 3; * * * and thus the restraint is compelled by the direction of the state acting as sovereign." 433 U.S. at 360.

In applying the *"Parker"* doctrine, *Bates* cites with approval both *Parker* and *Olsen,* and distinguishes *Goldfarb* ["the Virginia Supreme Court did not require use of minimum fee schedules"] and *Cantor*:

> "We believe, however, that the context in which *Cantor* arose is critical. First, and most obviously, *Cantor* would have been an entirely different case if the claim would have been directed against a public official or public agency, rather than against a private party. Here, the appellants' claims are against the State. The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. *In re Wilson,* 106 Ariz. 34, 470 P.2d 441 (1970). Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee acts as the agent of the court under its continuous supervision.
>
> Second, the Court emphasized in *Cantor* that the State had no independent regulatory interest in the market for light bulbs. 428 U.S., at 584-585; *Id.,* at 604-605, 612-614 (concurring opinions). There was no suggestion that the bulb program was justified by flaws in the competitive market or was a response to health or safety concerns. And an exemption for the program was not essential to the State's regulation of electric utilities. In contrast, the regulation of the activities of the bar is at the core of the State's power to protect the public. Indeed, this Court in *Goldfarb* acknowledged that '[t]he interest of the States in regulating lawers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been

> "officers of the courts."' 421 U.S. at 792. See *Cohen* v. *Hurley,* 366 U.S. 117, 123-124 (1961). More specifically, controls over solicitation and advertising by attorneys have long been subject to the State's oversight. Federal interference with a State's traditional regulation of a profession is entirely unlike the intrusion the Court sanctioned in *Cantor.*
>
> Finally, the light-bulb program in *Cantor* was instigated by the utility with only the acquiescense of the state regulatory commission. The State's incorporation of the program into the tariff reflected its conclusion that the utility was authorized to employ the practice if it so desired. See 428 U.S. at 594, and n. 31. The situation now before us is entirely different. The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior. Moreover, as the instant case shows, the rules are subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings. Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; *we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active."* (emphasis added)[8] 433 U.S. at 361-362.

The California statutes challenged here are similar to those of Arizona in the sense that the state policy is clearly and affirmatively expressed in the legislative regulation, and the state's supervision over the regulated conduct is pervasive and active. As in *Bates,* the regulations reflect a clear articulation of the state's

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[8] Thus, according to the Court, *Cantor* would have been an entirely different case if the challenged party had been a public official or agency, rather than a private party.

policy with regard to the automotive dealer-franchisee manufacturer-franchisor relationship. As in *Parker,* the state, in adopting and enforcing these regulations, made no contract or agreement and entered into no conspiracy in restraint of trade. Rather, it sought in its capacity as sovereign, to regulate an area of commerce which it found necessary to supervise.

Finally, in *Lafayette* v. *Louisiana Power and Light Co.,* U.S. ——, 55 L.Ed. 2d 364, 98 S.Ct. —— [No. 76-864, 1978], Louisiana cities are granted the power to own and operate electric utility systems. In *Lafayette,* two Louisiana cities brought an action alleging that the practices of several of their private competitors were in violation of the Federal antitrust laws. One competitor counterclaimed, seeking damages and injunctive relief on various alleged antitrust offenses.

The cities' principal argument was that "since a city is merely a subdivision of a state and only exercises power delegated to it by the state," *Parker's* findings regarding the Congressionally intended scope of the Sherman Act apply with equal force to such political subdivisions.

The sharply divided Court, in Parts II and III of the Opinion delivered by Justice Brennan,[1] forcefully rejected the cities' principal argument. The Court reviewed *Parker, Goldfarb* and *Bates,* concluding:

> "These decisions require rejection of petitioners' proposition that their status as such automatically affords governmental entities the 'state action' exemption." 55 L.Ed.2d at 382.

[1] In which Parts Justices Marshall, Powell and Stevens joined, and Chief Justice Burger concurred.

The Court believed its analysis in *Cantor* to be inapplicable in *Lafayette*:

> "*Cantor* was concerned with whether anticompetitive activity in which purely private parties engaged could, under the circumstances of that case, be insulated from antitrust enforcement, the situation involved here, on the other hand, presents the issue of under what circumstances a State's subdivisions engaging in anticompetitive activities should be deemed to be acting as an agent of the State." *Id.*

The Court emphasized that, as applied by *Goldfarb* and *Bates,* "*Parker's* state action" immunity doctrine applies only to

> "[O]fficial action directed by [the] State, arises from the basis for the 'state action' doctrine—that given our 'dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, a Congressional purpose to subject to antitrust control the State's acts of government will not lightly be inferred." 55 L.Ed.2d at 382.

The Court also noted that

> "*Parker*'s limitation of the exemption to 'official action directed by the State,' 317 U.S. at 351, is consistent with the fact that the States' subdivisions generally have not been treated as equivalents of the States themselves." 55 L.Ed.2d at 382.

The Opinion subsequently explains:

> "The *Parker* doctrine, so understood, preserves to the States their freedom under our dual system of federalism to use their municipalities to administer state regulatory policies free of the inhibi-

> tions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the free market." 55 L.Ed.2d at 384.

See, also, *United States* v. *Texas State Board of Public Accountancy,* 1978-1 Trade Cases, ¶ 62,039 at pp. 74,-476, 74,477 (W.D.Tex. 1978).

As in *Lafayette,* the regulations challenged in this case involve official action directed by the state and determined by the state in its capacity as sovereign. The actions of the California Motor Vehicle Board are taken pursuant to that state regulation and in furtherance of an explicit state command. This regulation contemplates, and the Board's conduct involves, state action.

As required by the Court in *Lafayette, Cantor* and *Goldfarb,* the challenged action here is both directed and enforced by the states and is not simply the action of a private party or political subdivision in which the state has acquiesced.

The challenged regulatory schemes represent the considered judgment and command of the California Legislature. Here the very State agencies and State Board charged by the Legislature with enforcement of the Act, have been named as parties defendant, and their conduct in implementing the statute is clearly "required by the State acting as sovereign." *Cantor, supra,* 428 U.S. at 592-593; *Goldfarb, supra,* 421 U.S. at 790.

Given the express mandate of the Act, and particularly §§ 3062 and 3063 and the compelling state interest reflected thereby, the Act which Appellees here have sought to enjoin and have challenged in this action represents a classic example of "state action" which the

Federal antitrust laws were not intended to cover. The supremacy clause is inapplicable.

C. The Act Fully Comports With The Commerce Clause and Neither Discriminates Against Nor Unduly Burdens Interstate Commerce

State regulation of "internal commercial business affairs" is a proper exercise of the police power. *Ferguson* v. *Skrupa,* 372 U.S. 726, 730 (1963); *Parker* v. *Brown, supra; Nebbia* v. *New York,* 291 U.S. 502, 531 (1934); *North Dakota State Board of Pharmacy* v. *Shyder's Drug Stores, Inc.,* 414 U.S. 483. Also state legislative enactments are presumed to be constitutional:

> "A legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which is has transcended its power." *Atchison, T. & S.F.R. Co.* v. *Matthews,* 174 U.S. 96 (1889).

The general proposition is clear that the Federal judiciary is hesitant to interfere in State economic regulation except where there is a clear burden placed on interstate commerce and that burden outweighs the value of the State's reason for attempting regulation or where discrimination is made against outsiders.

Sections 3062 and 3063 are clear in their command. They apply evenhandedly to all manufacturers. The Act places no restrictions upon the access of any motor vehicle manufacturer to any California market. Nor is there any obstruction on the flow of any manufacturer's vehicle into California. See *Southern Pacific*

Co. v. *Arizona, supra.; Bibb* v. *Navajo Freightlines, Inc.,* 359 U.S. 520 (1959); *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440, 443 (1960).

Fundamental to Appellees "Commerce Clause" attack upon the Act is the question of the State's right and power to regulate the establishment of new motor vehicle franchises.

Sections 3062 and 3063 set forth requirements similar to those of the laws of a great many other states. The sections reflect the growing importance of the automobile to the economy of a state and a growing legislative concern for the interests of automobile dealers as small businessmen important to the community, but with significantly less bargaining power than that of the manufacturer-franchisor. [See Appendices "A" and "B" which list citations to such statutes.]

The California Legislature, as did the legislatures of the thirty-seven other states, promulgated this Act with the benefit of extensive hearings, reports and legislative studies. These hearings and studies clearly demonstrated a persistent pattern of unfair dealing between franchisee-dealers and franchisor-manufacturers which had an anticompetitive effect, and which dealing was found to be inimical to the state's economy and public interest.

For example, hearings disclosed that:

> "To the manufacturers the dealership is a sales outlet to be judged solely on its efficiency in furthering the manufacturer's interests. He demands the right to increase, decrease or substitute sales outlets as he deems necessary. The dealer regards himself as an independent businessman and his franchise as a property right, the loss of which will cause him damage. This conflict in interest is between parties of totally unequal economic power. As a result, the manufacturer has been able to determine arbitrarily the rules by which the two parties conduct their business affairs. The rules are incorporated in the sales agreement which the manufacturer has prepared for the dealer's signature. A Study of the Antitrust Laws, Staff Reports on the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary 84th Cong., 2d Sess. 13 (1956).

It was determined that the existence of such imbalance was undesirable and placed too much economic power in the hands of a few:

> "The plight of the dealers is a notable example of the effects of too great concentration of economic power in the hands of a few corporation managers. A single decision by the president of General Motors may vitally affect the business of over 18,000 small business men in every city, town and village in the country. The corporation directs almost every action of the dealer, as though he were an agent or employee, but lets him bear all the burdens and risks entailed by so-called independence." *Id.* at 13.

As to the prevalence of the problem in the industry at large, it was found that "the problems of the General Motors dealers under the franchise are, in the main, common to all dealers in the industry." Senate Report at 14.

As a result, it was recommended that "legislation is needed to equalize the balance of power not heavily

weighted in the manufacturer's favor." Senate Report at 14.

A parallel study reached an almost identical conclusion:

> "Concentration of economic power in the automobile manufacturing industry of the United States has developed to the point where legislation is required to remedy the manifest disparity in the ability of franchised dealers of automotive vehicles to bargain with their manufacturers. Investigations of the automobile industry, moreover, demonstrate a continuing trend toward greater concentration, as well as abuse by the manufacturers of their dominant position with respect to their dealers. These investigations have disclosed practices and conditions which require new legislative methods and a change in established concepts." H. Rep. No. 2850, Report on Automobile Dealer Franchises, 84th Cong., 2d Sess. 3 (1956).

In recommending legislation designed to remedy the dealers disparate bargaining position, the importance of automobile dealers to the public was emphasized:

> "While the individual automobile dealer may be classified as a small-businessman, collectively the automobile-dealer group is of great importance to the economy. Franchised automobile dealers have a total investment in their businesses in the amount of more than $5 billion and employ approximately 668,000 persons. *Id.* at 3-4

Congress enacted an "Automobile Dealer Day in Court Act", 15 U.S.C. § 1222-1225, which it stated was only a step toward solving dealer problems, Senate Report at 97, and expressly preserved for the state the right to enact legislation of their own on the subject. 15 U.S.C. § 1225.

California, as have thirty-seven other states, has taken action in an area of legitimate state concern, an area which the Federal Government preserved for state action.

Indeed, the Courts which have reviewed these statutes have found them properly grounded upon the state's police power. For example, in *Kuhl Motor Co.* v. *Ford Motor Co.*, 71 N.W.2d 420, 427 (Wis. 1955), the Wisconsin Supreme Court rejected a constitutional argument that the motor vehicle dealer franchise statute of that state had no police power justification, saying:

> "It would seem reasonably clear that one of the chief objectives of the legislature in enacting . . . [the statute] insofar as it seeks to regulate the dealings between automobile manufacturers and dealers, is to promote fair dealing, which, of course, is a legitimate exercise of police power."

See, *Forest Home Dodge, Inc.* v. *Kansas,* 138 N.W.2d 214 (Wis. Sup. Ct. 1966) [which again upheld the statute previously examined in *Kuhl*].

The appropriateness of state legislation in this area has been confirmed in a long series of cases—*e.g.*, *B & T Distributors, Inc.* v. *Meister Bran, Inc.,* 450 F.2d 29 (7th Cir. 1972); *Ford Motor Co.* v. *Pace,* 335 S.W. 2d 360 (Tenn. 1960); *Best Motor Co.* v. *International Harvester Co.,* 252 F.2d 278 (5th Cir. 1958); *Buggs* v. *Ford Motor Co.,* 113 F.2d 618 (7th Cir. 1940); *Willys Motors, Inc.* v. *Northwest Kaiser-Willys, Inc.,* 142 F.Supp. 469 (D. Minn. 1956); *Plantation Datsun, Inc.* v. *Calvin,* 275 So.2d 26 (Fla. Dist. Ct. App. 1973); *Bill Kelly Chevrolet, Inc.* v. *Calvin,* 322 So.2d 50 (Fla. Dist. Ct. App. 1975); *Home Volkswagen, Inc.* v. *Cal-*

vin, 338 So.2d 1287 (Fla. Dist. Ct. App. 1976); *see generally* Note, *Statutory Regulation Of Manufacturer-Dealer Relationships In The Automobile Industry,* 70 Harv.L.Rev. 1239 (1957).

The relationship between the interests of motor vehicle dealers and the public interest has likewise been recognized by the courts. For example, in *E. L. Bowen & Co.* v. *American Motors Sales Corp.,* 153 F.Supp. 42 (E.D. Va. 1957), the Court observed:

> "Through the power of a franchise, manufacturers may resort to tactics having a serious effect upon the economies of dealers and, in turn, the public in general." 153 F. Supp. at 46.

The enactment by the California legislature of Sections 3062 and 3063 were clearly an exercise of its reserved police power to regulate internal commercial business affairs which have been found to effect the state's economy and public interest. Moreover, the state's action in this regard occurred in an area specifically reserved for independent state regulation by the Federal Government. The state therefore, had a legitimate and uncontestable right to promulgate these sections.

Further, nothing within the provisions of those sections themselves has the effect of discriminating either directly or indirectly against automobile manufacturers outside as opposed to inside the state of California.

The Act by its very terms applies evenhandly to all manufacturers. Sections 3062 and 3063 address only the grant or relocation of a motor vehicle franchise

for a given line-make in a trade area already served by an existing dealer or dealers in that line-make. The sections apply regardless of where the manufacturer is located.

The statute does not seek to protect local businesses from out-of-state competitors. *Hunt* v. *Washington State Apple Advertising Commission,* 432 U.S. 333, 97 S.Ct. 2434, 2445 (1977). The California Act likewise does not attempt to isolate its own economy. *Dean Milk,* 340 U.S. at 354. Nor does the Act prohibit or curtail the flow of interstate goods. There is no restriction upon the access of any motor vehicle manufacturer to any California market.

General Motors' Buicks and Chevrolets continue to be shipped into California for sale through franchised dealers throughout the state, including such dealers in the Pasadena and Glendale markets.

The California Act is not directed to exclusively interstate transactions. *Compare, H. P. Hood & Sons* v. *DuMond,* 336 U.S. 525 (1949), nor does it constitute a regulation "of interstate commerce itself." *Lemke* v. *Farmers Grain Co. of Embden,* 268 U.S. 189 (1925). *See, H. P. Hood & Sons,* 336 U.S. at 537. The Act does not effect a prohibition on the flow of interstate goods. *Brimmer* v. *Rebman,* 138 U.S. 78 (1891); *Minnesota* v. *Barber,* 136 U.S. 313 (1890).

In rejecting the challenge that state regulation has impermissibly discriminated against interstate commerce, this Court has found the absence of similar factors controlling in its findings of no discrimination.

Panhandle Eastern Pipe Line Co. v. *Michigan Public Service Commission,* 341 U.S. 329 (1951). *Compare, Breard* v. *City of Alexandria,* 341 U.S. 622 (1950).[8]

In *Panhandle,* the appellant "natural gas company" transported that commodity in interstate commerce for distribution and sale in the State of Michigan. Appellee was a public utility of that state which distributed gas to domestic, commercial and industrial consumers in and around the City of Detroit and obtained its entire supply of natural gas from the appellant. In response to Panhandle's proposal to secure large industrial customers for the direct sale of natural gas in Michigan, the Michigan Public Service Commission issued an order requiring the company to obtain a certificate of public convenience and necessity before engaging in such direct sales. Noting that the end result of the order "might be the prohibition of particular direct sales," (341 U.S. at 334) by Panhandle the Court rejected the argument the company's right "to compete for the cream of the volume business without regard to the local public convenience or necessity," (*Id.*) was embodied in the Commerce Clause:

> "It is no discrimination against interstate commerce for Michigan to require appellant to route its sales of gas through the existing certified utility where the public convenience and necessity would not be served by direct sales. That there is neither discrimination nor prohibition here saves this regulation from the rule of such cases as *Hood and Sons* v. *DuMond,* . . . where a state was said to have discriminated against interstate commerce by *prohibiting* it because it would subject local business to competition. And the statute under which the Michigan Commission acted does not distinguish between an interstate or intrastate agency desiring to operate in a locality already served by a utility. *Id.* at 336-37 (citations omitted) (emphasis added)."

[8] See, Brief of Appellees in *Exon Corp., et al.* v. *Maryland,* December 17, 1977 [Appeal Nos. 77-10, 77-11, 77-12, 77-47 and 77-64].

Appellees here distribute their goods in the California markets through sales to franchisees. The Act does not operate as a "prohibition" nor does it distinguish between an "interstate or intrastate" company desiring to operate within the California retail market.

Similarly, in *Breard,* this Court rejected the argument that a local ordinance constituted a discrimination against interstate commerce where the goods of interstate solicitors were not denied entry within municipal borders. The City of Alexandria, Louisiana, by ordinance required door-to-door salesmen to obtain the consent of residents before engaging in such solicitation. Although the statute on its face applied equally to out-of-state and in-state sellers, appellants nevertheless argued that the law placed "an undue and discriminatory burden upon interstate commerce . . . in effect . . . tantamount to a prohibition of such commerce," favoring the operation of local retail merchants. 341 U.S. at 635. Rejecting appellant's argument that the fact that the statute imposed significant financial burdens upon its operations constituted an undue burden upon interstate commerce, the Court held:

> "[T]he usual methods of seeking business are left open by the ordinance. That such methods do not produce as much business as house-to-house canvassing is, constitutionally immaterial and a matter for adjustment at the local level in the absence of federal legislation. . . . Taxation that

> threatens interstate commerce with prohibition or discrimination is bad, . . . but regulation that leaves out-of-state sellers on the same basis as local sellers cannot be invalid for that reason. 341 U.S. at 638.

As in *Breard,* the challenged regulations here leave all out-of-state sellers on the same basis. Since there are no local manufacturers, there is no discrimination and the Act is merely the exercise of justifiable regulations as opposed to prohibited discriminatorily conduct.

The flow of Appellees' product here is neither prohibited nor curtailed by the California Act. The "usual methods of seeking business are left open by the ordinance."

Indeed, the effect of the California Act upon Appellees operation differs in kind from the burdens found to inhere in statutes invalidated by previous decisions of this Court. The Act has absolutely nothing to do with the interstate transportation or movement of automobiles. It sets up, *inter alia,* certain regulations governing relations of manufacturer-franchisors and franchisees. The law is directed, at a "wholly intrastate activity". The present factual situation most closely approximates those decisions in which state statutes regulating "essentially local" activity have been sustained notwithstanding their incidental effect upon interstate commerce. See, *e.g., Milk Control Board* v. *Eisenberg Farm Products,* 306 U.S. at 352; *Parker* v. *Brown,* 317 U.S. at 361; *Highland Farms Dairy* v. *Agnew,* 300 U.S. 608 (1936).

Statutes which serve a public purpose and do not discriminate against interstate commerce must then be judged as to whether "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Great Atlantic & Pacific Tea Co.* v. *Cottrell,* 424 U.S. 366, 371-72 (1976); *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137, 142 (1970).

The California Act is not "clearly excessive" in its effect on interstate commerce. The Act does not obstruct the flow of any manufacturer's vehicles or products into California. The Act was neither intended nor can it serve to block the sale of a manufacturer's products in California.

The Act regulates the establishment of more dealerships in a trade area than trade in that area will reasonably support. Regulation, however, can take effect only after "good cause" has been established for allowing an additional franchise for the same line make. Such a showing must be based upon a determination as to whether the establishment of an additional franchise would *increase competition* and *therefore be in the public interest."* (emphasis supplied).

The Act does not protect existing dealers from further competition. A proposed dealer cannot be precluded from operating in a market simply on the ground that an existing dealer in the same line-make is already present in that market.

Further, the Act does not perpetuate a dealer who is an inadequate representative in a market; nor does it not preclude the termination or nonrenewal of his franchise. It does, however, set forth certain proce-

dures that must be followed when that action is taken. (§§ 3060 and 3061).

In any case, the statute specifically provides that either party may seek judicial review of the final Board decision. The entire process, therefore, is further protected against arbitrary or unreasonable action by reason of direct access to the California courts to challenge any Board decision.

As in *Panhandle* and *Breard,* the challenged sections of the California Code are valid state regulation "not absolute prohibition." No burden on interstate commerce is involved and there is no discrimination between out-of-state and in-state automotive manufacturers. The sections seek to regulate an area of the California economy which has been found to have involved unfair business practices which affect the economic well-being of state businesses and the public interest. Sections 3062 and 3063 are clearly valid state regulation of the internal commercial business affairs of the State of California and in no way violate the Commerce Clause of the United States Constitution, nor do they unlawfully discriminate against out-of-state businesses.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Appellants' Briefs, the decision of the United States District Court for the Central District of California should be reversed.

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APPENDIX

APPENDIX A

Summary of State Statutes Which Prescribe Conditions Under Which New or Additional Franchise Outlets Are Permitted in the Community or Territory of an Existing Franchise Dealer

State	*Applicable Section of State Law*
Arizona	Arizona Revised Statutes 28-1304.02
California	California Vehicle Code 3062, 3063
Colorado	Colorado Revised Statutes 13-11-20
Florida	Florida Statutes Section 320-642
Georgia	Georgia Code Section 84-6610(f)(10)
Hawaii	Hawaii Revised Statutes 437-28(a)(22)(b)
Iowa	Iowa Code Annotated Section 322A.4
Massachusetts	Annotated Laws of Massachusetts 93B Section 4(3)(1)
Nebraska	Revised Statutes of Nebraska Section 60-1422
New Hampshire	New Hampshire Revised Statutes Annotated Section 357-B, Section 4(III)(1)
New Mexico	New Mexico Statutes Annotated Chapter 6 (Laws of 1973)
North Carolina	North Carolina General Statutes Section 20-305(5)
Rhode Island	Rhode Island Statutes Section 31-5.1-4(c)(11)

South Dakota	South Dakota Codified Laws Section 32-6A-3, 4
Tennessee	Tennessee Code Annotated Chapter 17 Section 59-1714(j)
Vermont	Vermont Statutes Annotated Title 9 Chapter 107 Section 4074(c)(9)
Virginia	Virginia Code Annotated Section 46.1-547(d)
Wisconsin	Wisconsin Statutes Annotated Section 218.01(3)(f)
West Virginia	West Virginia Code Volume 14 Section 47-17-5(i)

APPENDIX B

States (Including the Commonwealth of Puerto Rico) Which Provide Certain Rights by Law to Franchise Motor Vehicle Dealers—Generally Including a Provision Which Protects the Franchise Dealer from Arbitrary and Unreasonable Cancellation of His Franchise Without Due Cause.

(In addition to the states listed here, those states listed on Appendix "A" also generally have comparable provisions).

State	*Applicable Section of State Law*
Arkansas	Arkansas Statutes Section 75-1501 et seq. (defeated at referendum, Nov. 6, 1962); Section 75-160 et seq. (Acts 1949, No. 142, amended 1959)
Connecticut	Connecticut General Statutes Section 14-51 et seq.
Idaho	Idaho Code Section 49-135 et seq.
Kansas	Kansas Statutes Annotated Section 8-126 et seq.
Kentucky	Kentucky Revised Statutes Section 190.010 et seq.
Maine	Revised Statutes of Maine Annotated Chapter 29, Section 1 et seq.
Maryland	Annotated Code of Maryland Article 66-1/2 Section 61 et seq.
Minnesota	Minnesota Statutes Annotated Section 168.27 et seq.
Mississippi	Mississippi Code Annotated Section 8071.3
New Jersey	New Jersey Statutes Annotated Section 39:10-1 et seq.

New York	McKinney's Consolidated Laws of New York Annotated, General Business Law Section 195 et seq., Vehicle and Traffic Law Section 415 et seq.
North Dakota	North Dakota Century Code Section 39-22-01 et seq., Section 51-07-01 et seq.
Ohio	Page's Ohio Revised Code Annotated Section 4517.01 et seq.
Oklahoma	Oklahoma Statutes Annotated Title 47 Section 22.15a, Title 47 Section 561 et seq.
Pennsylvania	Purdon's Pennsylvania Statutes Annotated Title 75 Section 409, Title 69 Section 601 et seq., Title 63 Section 801 et seq.
Commonwealth of Puerto Rico	
South Carolina	Code of Laws of South Carolina Section 46-91 et seq.
Texas	Vernon's Texas Civil Statutes, Cities, Towns and Villages Article 1015e, State Highways Article 6686

see

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